IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr. Appeal No. 40 of 2003

Date of decision: 27th October, 2011

State of Himachal Pradesh …**Appellant**

Versus

Raj Kumar @ Raju ….**Respondent**

Coram

The Hon'ble Mr. Justice R.B. Misra, J.

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellant: **Mr. R.K. Sharma, Senior Additional Advocate General with Mr. Rajinder Dogra, Addl. Advocate General.**

For the Respondent: **Mr. Anup Chitkara, Advocate**

Dev Darshan Sud,J.(oral)

The State has challenged the acquittal of the respondent who was charged for offences under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) on the allegations that the respondent was found in conscious possession of 1 Kg. 100 grams of charas.

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[1] *Whether the reporters of Local Papers may be allowed to see the judgement*?

2. The prosecution case in brief is that the respondent who was a resident of Punjab was searched and 1 Kg. 100 grams of charas was found inside his underwear which he was wearing. The case proceeds that on 13.11.2001 at around 12.40 PM a HRTC bus No. HP-48-4517 travelling from Chamba to Delhi was stopped at TCP Tanuhatti barrier by the police for routine checking. PW11 Shri Kushal Chand ASI boarded the bus from the front door and Const. Budhi Singh was asked to guard the rear door of the bus so that nobody alights and escapes. The respondent was found seated on seat No. 32. He says that when he was checking this passenger, he found that something was concealed in between his waist and private parts. On inquiry he disclosed his name as Raj Kumar, son of Tarsem Lal Balmiki, resident of Jodhowal, Rahon Road, Gali No. 4, Balmiki Nagar, Ludhiana and then also stated that he was carrying charas. He was asked to alight from the bus and was made to sit in gumti (shelter) of the check post. He states that he wrote ruka Ext.PG and sent it to the Police Station, Dalhousie through Const. Beer Singh, PW8 for registration of the case. Ruka was also sent to the Superintendent of Police, Chamba through Const.

Gulam Nabi and SHO Khub Ram PW14 also joined in the investigation. He prepared consent memo Ext.PH and signatures of the accused were obtained on it. On search, charas was recovered from the accused, which was wrapped in a red cloth, tied with a string, which on weighing on the scales, which had been brought by PW5 Budhi Singh, was found to be 1 Kg. 100 grams. Two samples of 10 grams each were separated from this contraband and sealed with seal 'K' and the remaining charas was again resealed. Om Parkash PW1 has signed this memo. In cross examination, he first says that no personal search of the accused was conducted vide memo Ext.PA, but again changed his statement by saying that it was conducted by PW14 SHO Khub Ram. He says that the accused was made to understand the meaning of gazetted officer. Then again says that his statement was recorded by the Investigating Officer where he has not stated that the accused was made to comprehend the meaning of words "gazetted officer". He admits that he questioned the accused/respondent in the presence of driver and conductor of the bus with respect to the fact as to whether the accused was carrying charas or not.

3. PW14 Inspector Khub Ram states in his evidence that he was associated with the investigation at the spot where he had reached after information was imparted to him by PW11 ASI Kushal Chand, Incharge of TCP Tunuhatti barrier. He then says that after obtaining the consent of the respondent/accused to be searched by the police, he proceeded further. He was searched in the presence of marginal witnesses namely Om Parkash PW1 and Kushal Kumar PW11. The accused-respondent was wearing a pant, underpant and underwear. Inside the underwear he had concealed a cloth which was red in colour having white strings on its side and when it was opened, it was found containing charas in a plastic bag. Thereafter, the witness corroborates the prosecution case with respect to weighing of the contraband, sealing it etc. and sending it to the Central Forensic Laboratory for testing. He admits in his cross examination that he did not record the name of any witness in whose presence the accused was apprised of his right to be searched by a gazetted officer or himself. This, in a nutshell, is the prosecution case.

4. The learned trial Court on the evidence on record acquitted the accused primarily on the

grounds that the prosecution has been unable to prove (a) conscious possession of the charas; (b) that the accused was given a meaningful option of being searched by a gazetted officer or by the police in consonance with the provisions of the NDPS Act; (c) all the independent witnesses, who were present during the investigation/proceedings, resiled from their evidence.

5. Adverting to the prosecution case, what we find is that PW1 Om Parkash who is the witness to the recovery memo Ext.PA and memo of arrest Ext.PB stating that the accused was asked as to whom the information of arrest should be conveyed, Ext.PH informing the accused about his right to be searched by a gazetted officer or police, Ext.PJ memo recording that personal search of Khub Ram has been carried out. Adverting to his evidence, what we find is that he has made a plain and simple denial about the occurrence of the entire incident. He states:

> *"……No bus was searched by the police in my presence nor anything happened in my presence."*

In cross examination at length by the Public Prosecutor, he says that when he was associated by the police for investigation etc. in TCP Tunuhatti, the accused was in

the custody of the police. He states that there was one more person in their custody. He says that neither the police inquired about the whereabouts of the accused in his presence nor he was searched in his presence. He admits his signatures on Ext.PA but denied that such proceedings have been carried out in his presence. He has denied that he has been won over by the accused. He admits his signatures on memo of arrest Ext.PB and also on Ext.PC which is the statement of accused with respect to the information to be given. In cross examination by the defence, he says that 40-50 persons remain present at Tanuhatti barrier at any point of time and there are forest, toll tax, excise and marketing check posts at this place. He then admits that he is working as a Langari (cook) with the police at Tunuhatti and that he was cooking/preparing food for the police personnel when he was called by them for affixing his signatures on the documents which had already been written when he reached the spot. He says that he was told by the police about the nature of action to be taken. He is emphatic when he says that no charas was recovered in his presence.

6. PW3 Tilak Raj was the driver of the bus from which the accused was arrested. He says that on 30.11.2001 the bus was going from Chamba to Delhi and Rakesh Kumar PW4 was its conductor. At around 12.15 PM when the bus reached near TCP Tunuhatti barrier it was stopped for routine checking. He does not remember as to who were asked to get down from the bus, but two persons were ordered by the police to alight. He could not recognize the accused. He says that no recovery was made in his presence and that he does not know that accused was the same person who is present in Court. He was cross examined at length but again nothing could be elicited from his evidence to destroy the veracity of his evidence.

7. PW4 Rakesh Kumar was the conductor of this bus. When it reached near TCP Tunuhatti barrier at around 12.30 PM it was stopped for routine checking and two persons were asked to get down from the bus. He could not recognize the accused as the person who was one of them. Again, he was also declared hostile. He could not identify Ext.P-2 and Ext.P-3 tickets as having been sold to be accused specifically. He says no conversation took place in his presence.

8. It is the evidence of these witnesses against the evidence of two police witnesses which the learned trial Court was called upon to consider. A submission made on behalf of the learned Senior Additional Advocate General is that the version of the police official cannot be doubted, their evidence cannot be considered with suspicion and that it is entitled to consideration/weight on the substantive content of what it contains. We have no doubt in our mind that this is the principle of law established and that there is no universal principle requiring corroboration of the evidence of an official witness including police witnesses merely because of the fact that they are police personnel or official personnel. But in this case what we find is that PW1 Om Parkash is the langari (cook) with the police and serving at the police post at TCP Tunuhatti. There is no reason to disbelieve this man's evidence. He is also an official witness and we have been unable to find anything in his cross examination which would suggest that he has been won over by the accused or is untruthful in Court for any motivated reason. We also note that he is a marginal witness of Ext.PA which is the recovery memo, Ext.PB which is the

memo of arrest with respect to obtaining the opinion from the accused as to whom information about his arrest is to be conveyed; Ext.PH which is the memo of consent regarding the option given to the accused for being searched either by the police or by a gazetted officer and Ext.PJ which is the personal search of Inspector Khub Ram. This witness states that he had only put his signatures on these forms, none of these proceedings were carried out in his presence. We also note at this juncture that Tilak Raj PW3 driver of the bus and PW4 Rakesh Kumar conductor have also not supported the prosecution story and denied any contraband having been recovered from the accused. Both these witnesses_are also employees of the State Road Transport Corporation and again we see no reason to disbelieve them. In such eventuality, it becomes very difficult to accept only one version put forth by the police that the accused was found in conscious possession of the charas. The prosecution witnesses themselves have stated that two persons were asked to get down from the bus. The identity of the second person remains obscure. In this view of the matter, we find that the learned trial Court was correct in holding

that the respondent has not been proved to have been found in conscious possession of charas, as alleged.

9. We now advert to the other aspects of the case as urged on behalf of the defence and that is that there is no compliance of Section 50 of the NDPS Act. We find that neither in Ext.PA nor in Ext.PH the accused has been informed or given an option in the manner as required by law. He has not been told that it is his right that he can be searched by a gazetted officer. The recording is in general nature which says that the accused has consented to be searched by the police and that it was told that he could be searched by a gazetted officer.

10. The underlying principle in Section 50 of the NDPS Act and rationale behind it has been adjudicated by the Supreme Court in *Ajmer Singh vs. State of Haryana (2010) 3 SCC 746* holding:

> *"14. The object, purpose and scope of Section 50 of the Act was the subject matter of discussion in number of decisions of this Court. The Constitution Bench of five Judges of this Court in the case of State of Punjab v. Baldev Singh, [(1999) 6 SCC 172], after exhaustive consideration of the decision of this court in the case of Ali Mustaffa Abdul Rahman Moosa vs.State of Kerala, [(1994) 6 SCC 569] and Pooran Mal vs. Director of Inspection (Investigation),*

New Delhi & Ors., [(1974) 1 SCC 345], have concluded in para 57 :

(I) When search and seizure is to be conducted under the provision of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article, recovered from his person, during such search.

(IV) The investigation agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non compliance of the procedure i.e. informing the accused of the right under sub-Section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying the procedure under Section 50,cannot

> *be relied upon as evidence for proving the unlawful possession of the contraband." (at p. 751-752)*

This principle finds reiteration in *Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC 609.* The Court holds:

> *"20. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.*
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> *22. We may, however, add that while considering the question of compliance with Section 50 of the NDPS Act, the Constitution Bench in Baldev Singh (supra) considered the provisions of Section 41 as well. It observed as under : (SCC p. 189, para 8)*
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> *"8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics,Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document*

or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place."

(emphasis in original)

23. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh's case (supra). We are concerned with the following conclusions: (SCC pp. 208-10, para 57)

"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

** * **

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the

evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

26. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in Karnail Singh Vs. State of Haryana (2009) 8 SCC 539. Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in Baldev Singh's case (supra) is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards

given to the suspect have been taken away completely. The Court observed : (Karnail Singh case (2009) 8 SCC 539, SCC p. 553, para 31)

> *"31.....Through this amendment the strict procedural requirement as mandated by Baldev Singh case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case (1996) 6 SCC 172 was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh case is diluted."*

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

> *32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well." (at pp. 617,618,620,622)*

11. The cumulative effect of the above discussion is that the State has failed to prove (a) conscious possession by accused as we find the evidence on record does not prove this fact; (b) compliance with the provision of Section 50 of the NDPS Act. Thus, there is no merit in this appeal, which is accordingly dismissed. Bail bonds furnished by the respondent stand discharged.

(R.B. Misra)
Judge

(Dev Darshan Sud)
Judge

October 27, 2011(ms)